Thou shalt not ‘break international law in a very specific and limited way’

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On 9 January 2020, the House of Commons – one part of the British Parliament – passed the European Union (Withdrawal Agreement) Act 2020, which enabled the United Kingdom (UK) to ratify the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the Withdrawal Agreement). After the rejection of several amendments made by the House of Lords – the other part of the British Parliament – the Act received Royal Assent on 23 January 2020. The Agreement was signed the next day by Prime Minister Boris Johnson and entered into force on 1 February 2020, when the UK left the European Union (EU). Annexed to the Withdrawal Agreement was a Protocol on Ireland/Northern Ireland (the Northern Ireland Protocol), the purpose of which is to avoid the introduction of a hard border on the island of Ireland after the end of the transition period on 31 December 2020, when the UK’s relationship with the EU will either be based on a Free Trade Agreement or the Withdrawal Agreement. The Northern Ireland Protocol covers a range of areas: human rights, the Common Travel Area, customs and trade, regulation of manufactured goods, the Single Electricity Market, state aid provisions, and VAT and excise.

In a Policy Paper on “The UK’s Approach to the Northern Ireland Protocol”, published by the UK Cabinet Office in May 2020, it is stated that “[w]hilst the Protocol is in force, both the UK and EU must respect and abide by the legal obligations it contains, as well as our other international law obligations” (para. 5). But on 9 September 2020, the British Government introduced the United Kingdom Internal Market Bill to the House of Commons. Section 43(2) of the Bill expressly provides that the Secretary of State may by regulations make provisions which disapply or modify the effect of Article 10 of the Northern Ireland Protocol for the purposes of domestic law, and section 45 states that section 43 and several other provisions of the Bill “have effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent”. Any relevant international or domestic law includes any provision of the Northern Ireland Protocol, the EU Withdrawal Agreement or other EU law or international law. According to the EU, the Bill, if adopted as proposed, would be in clear breach of Article 5 (3) and (4) and Article 10 of the Northern Ireland Protocol and Articles 4 and 5 of the Withdrawal Agreement.

An unusually candid announcement of a (potential) breach of international law by treaty override

Prior to the introduction of the Bill, on 8 September 2020, an urgent question was tabled in the House of Commons asking the Secretary of State for Northern Ireland to make a statement on the UK's commitment to its legal obligations under the Northern Ireland Protocol. During the ensuing debate, the Secretary of State was asked to give an assurance that "nothing that is proposed in this legislation does, or potentially might, breach international legal obligations or international legal arrangements that we have entered into" (col. 508). In reply the Northern Ireland Secretary stated:

"I would say to my hon. Friend that *yes, this does break international law in a very specific and limited way*. We are taking the power to disapply the EU law concept of direct effect, required by article 4 [of the Withdrawal Agreement], in certain very tightly defined circumstances. *There are clear precedents of this for the UK and, indeed, other countries needing to consider their international obligations as circumstances change*. I say to hon. Members here, many of whom would have been in this House when we passed the Finance Act 2013, that that Act contains an example of treaty override. It contains provisions that expressly disapply international tax treaties to the extent that these conflict with the general anti-abuse rule. I say to my hon. Friend that we are determined to ensure that we are delivering on the agreement that we have in the protocol, and our leading priority is to do that through the negotiations and through the Joint Committee work. The clauses that will be in the Bill tomorrow are specifically there should that fail, ensuring that we can deliver on our commitment to the people of Northern Ireland." (col. 509; emphasis added)

The sentence, "yes, this does break international law in a very specific and limited way" – mostly quoted out of context – has caused a lot of uproar and indignation and has triggered a heated debate in the UK about the role of international law in British Government policy-making. But is the specific and limited breach of international law really such an outrageous and unprecedented action? Practice shows that States regularly breach international law, be it treaties, customary rules, or binding UN Security Council resolutions.

Before dealing with the substance of the Secretary of State's statement, three general observations are called for. First, the UK has not broken any international law so far. The statement "this does break international law in a very specific and limited way" is somewhat misleading. The mere act of laying a bill before Parliament is not a breach of international law, neither would be an Act based on the Bill; only the exercise of the powers provided by the legislation would be. All that has happened so far is an attempt by the UK Government to provide the ground for the constitutional validity of future breaches of international law. As the Lord Advocate said in the House of Lords on 10 September 2020, "it will be for Parliament to determine whether, at the end of the day, it decides to pass this legislation."

Second, any breach of international law is necessarily "specific" and "limited". No country breaks all of international law all the time. As American scholar Louis Henkin once famously noted: "Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." But only "almost all of their obligations" and only "almost all of the time". Any comparison that

you cannot break international law in a specific and limited way, just as you cannot be half or a little bit pregnant, is thus inapt.

Third, the Secretary of State did not suggest that the UK would break international law arbitrarily. The proposed legislation is rather to provide the British Government with the power to disapply "relevant international […] law" if the Joint UK-EU Committee established under Article 164 of the Withdrawal Agreement cannot reach agreement on how to apply the Northern Ireland Protocol or if a free trade agreement with the EU cannot be secured by 1 January 2021. The Secretary of State was thus alluding to a change of circumstances as a legal basis for the specific and limited disapplication of provisions of the Northern Ireland Protocol. He explained:

"[T]he withdrawal agreement and protocol are not like any other treaty. They were written on the assumption that subsequent agreements could be reached between us and the EU on the detail." (col. 499)

"We have a unique situation with this treaty. […] there are items and issues in the [Northern Ireland] protocol that were always designed to be worked through in the Joint Committee, because they were not able to be agreed and worked through at the time of the protocol." (col. 505)

Whether a failure to resolve outstanding issues in the Northern Ireland Protocol or to achieve a free trade agreement between the UK and the EU qualifies as a "fundamental change of circumstances" in terms of Article 62 of the Vienna Convention on the Law of Treaties (VCLT) is a question that may ultimately be put to arbitration under Article 170 of the Withdrawal Agreement. Considering the chequered and protracted history of the Brexit negotiations, it could be argued that, at the time of the conclusion of the Withdrawal Agreement in January 2020, there was a real possibility that no agreement would be reached by the parties on the application of the Northern Ireland Protocol and on a free trade agreement, and that the consequences for Northern Ireland were plain and well understood. The UK Government could thus face an uphill struggle to show that the requirements of Article 62 VCLT are met.

The German Federal Constitutional Court on the constitutionality of treaty overrides

Rather than delving into a hypothetical application of Article 62 VCLT to potential future breaches of the Northern Ireland Protocol or the Withdrawal Agreement though, it is suggested to take a step back and to look at how the question of breaches of international treaty obligations has been dealt with in other countries. In this context, the Order of the Second Senate of the German Federal Constitutional Court of 15 December 2015 is a useful reference point. In this case, the Court was called upon to decide on the constitutionality of statutes that violate international law. At issue was a provision in the German Income Tax Act which provided that certain tax exemptions on the basis of double taxation treaties were to be granted, "irrespective of such treaty", only if certain additional conditions were fulfilled. In

the German legal order, international treaties acquire the force of law by virtue of a statute. They share the rank of statutes in domestic law and, therefore, can be superseded by subsequent statutes that contradict the treaty stipulations in accordance with the principle of *lex posterior* (paras. 33, 49, 57). The unilateral breach of international treaty obligations by subsequent statute – known as a "treaty override" (cf. para. 14) – is not limited to "exceptional cases" but applies to all statutes (paras. 59, 73). The principle of *pacta sunt servanda*, which for its part is a general rule of international law, does not yield a different result (cf. para. 47). The Court stated that "[i]nternational law does not preclude legal acts that violate international law from being effective at the domestic level" (para. 61) and that "international law leaves it to each state […] to give precedence to national law" (para. 62). The constitutional principle of the rule of law also does not require that international treaty law take precedence over statutory law and thus does not preclude a unilateral treaty override (paras. 77-80).

The Court further held that any limitation on the legislature to make substantive modifications to international treaties would limit its discretion and would conflict with the principle of democracy. International treaties were constitutionally not "set in stone" (cf. paras. 53, 54, 80, 85). The Federal Constitutional Court dealt only with direct treaty overrides by the legislature. An interesting constitutional law question that would merit further exploration is whether treaty overrides require separate parliamentary votes on each breach of international law or whether, as in the case of sections 42 and 43 of the UK Internal Market Bill, a blanket authorization of the Secretary of State or a Minister of the Crown by Parliament to violate international law by regulation is sufficient. Considering the significance and the international legal consequences of treaty overrides, a good case could be made, at least in German constitutional law, that each breach of international law requires direct democratic legitimacy and thus a formal statute.

The Federal Constitutional Court was only seized with the question of the constitutionality of a treaty override; it did not pronounce on its international legality. However, the Court pointed out that international law requires States to perform in good faith the treaties they have concluded (Article 26 VCLT) and bars them from invoking domestic law to justify the breach of an international law obligation at the level of international law (Article 27 VCLT). The Court also stated: "Even though international law does not preclude domestic effectiveness of legal acts that violate international law, this does not mean that the resulting violation is insignificant" (para. 63). If a State violates its obligations under an international treaty, the other contracting States can demand, *inter alia*, compliance and reparation (Articles 34 et seq. of the ILC Articles on State Responsibility) and, in case of a material breach, may terminate the treaty or suspend its operation (Article 60 VCLT).

Prospective versus retrospective announcements of breaches of international law: some German examples

These legal consequences have not prevented States from undertaking unilateral treaty overrides or other specific and limited breaches of international treaties.

The fact that distinguishes the present case from other violations of international law – and to that extent makes it special or perhaps even unique – is the express and open admission of the (potential) breach in Parliament before the breach has actually happened. As a rule, States usually deny any wrongdoing or at least try to justify or explain away their violations of international law. If at all, breaches of international law are only admitted in private and confidential meetings or long after the responsible government official has left office. Again, a look to Germany may be illustrative.

A little-known breach of international law by Germany occurred in March 1973 but was admitted in a private meeting only in 1978 and became known to the general public only some 30 years later when the transcript of the meeting was declassified. On 30 November 1978, universally acclaimed German Chancellor Helmut Schmidt paid a rare visit to the Council of the German Federal Reserve – the Bundesbank – to discuss the negotiations over the creation of the European Monetary System (EMS). After the collapse of the Bretton Woods System in the early 1970s, the EMS was to create a new system of fixed exchange rates in order to guarantee an area of currency stability throughout the European Economic Community (EEC). Central banks were to be put under an obligation to intervene in other EEC member's currencies in order to maintain fixed exchange rates. The Council was less than enthusiastic about the EMS, to say the least, and the Chancellor came to provide assurances on its operation. The Bundesbank feared that there could be situations in which its intervention obligations could assume a scale that *de facto* made the fulfilment of its statutory responsibilities impossible. In case the EMS was to become part of the Treaty of Rome or any other international treaty, the members of the Council were therefore keen to reserve the right to withdraw at any time from the EMS, which they considered "the first phase of an experiment" and wanted to make sure that no impairment of national responsibility in the area of monetary policy resulted from the experiment. In order to allay the fears of the members of the Council, Chancellor Schmidt stated:

"[O]ut of consideration for domestic economic stability in spring 1973, [we] did not only override an agreement between issuing banks but also breached international law, applicable international treaty law, by releasing the Bundesbank from further intervention in the American dollar. And [we] did not even inform the IMF [International Monetary Fund] in advance, let alone give it the chance to influence the decision. I repeat what I have said before. In spring 1973, we breached applicable international treaty law, the IMF treaty, in multiple ways. We have neither complied with all the rules, the procedural rules of the treaty, nor have we complied with the substantive provisions. We have released the Bundesbank from the duty to intervene against the dollar solely with the motive of winning leeway for a stable, a stability-oriented policy in our country – we did so in consultation with the leadership of the Bundesbank and the then Finance Minister of the Federal Government; the then Federal Chancellor had approved of the action. We certainly did not notify earlier, when the Federal Republic of Germany joined the IMF, that, in case of need, we would apply the clausula rebus sic stantibus, we did not even write it down, we did it when there was no other way. […] (p. 30)

The detachment [of the Deutschmark] from the dollar, contrary to international law, [was carried out] because domestic stability was threatened too much. All of that was not previously written down somewhere or recorded in advance, deposited with a notary; so, if necessary, one must refer to this or that [provision] in the Treaty of Rome or elsewhere if someone should have legal objections – in truth, it is never a legal problem, only for Germans such things are legal problems, only for Germans and lawyers. German perfectionism must not prevail over political reason. I agree […], what is crucial is that exchange rate adjustments are made when necessary. We have already done this many times […] and it will also come about in the future. I have no doubts about that at all." (p. 31)

The other notable example of an admission after the event of a breach of international law by Germany concerns the controversial NATO bombing of the Federal Republic of Yugoslavia (FRY) (Serbia and Montenegro) in 1999 in order to avert an impending humanitarian catastrophe in the Yugoslav province of Kosovo. While the Federal Government officially took – and takes – the position that "the NATO air operations were permissible in international law" (p. 50, question 106), former Chancellor Gerhard Schröder told a discussion forum hosted by the weekly newspaper *Die Zeit* in Hamburg on 9 March 2014 that during the Kosovo crisis in 1999, when he was Chancellor, he had "violated international law." Asked about Russia's latest moves in Crimea, Schröder, who has been closely associated with Russian business interests since leaving office and is regarded as a friend of Russian President Vladimir Putin, replied:

"Of course, what is happening in Crimea is also a violation of international law. But do you know why I am a bit more careful with pointing the finger? I am going to tell you at an event like this because I did it myself. […] I violated international law. […] When we were faced with the question of how things would develop in the Republic of Yugoslavia, the war in Kosovo, we sent our warplanes, our Tornados, to Serbia, and together with NATO, we bombed a sovereign State without a decision of the Security Council. […] Without there being a decision of the Security Council – it was just like that. And my predecessor [Helmut Schmidt] has criticised this in the strongest terms. He had said, at the time, that without a Security Council decision this is not possible and, formally, he is right. However, I stand by my actions because I still see the flows of refugees and what was looming on the horizon. No question. But formally going to war without a decision of the Security Council was a violation of international law. […].

I believe that Kosovo is the blueprint of what we are currently witnessing in Crimea in two respects. […] formally, in both cases, the [UN] Charter was violated. It was just like that. At the time, we had as a justification only a comment of the Secretary-General of the United Nations and that, in everybody's judgment, was not sufficient. And the fact that it was occasionally said [that] this is the first humanitarian operation that was undertaken was something that was at least doubtful according to the preponderance of views in international law. We have used the argument anyway – no question – but you must understand that in the light of this, in the light of my own actions, this is a situation in which I am more cautious than others."

Putting things into perspective

The presentation of the German jurisprudence and practice is by no means supposed to justify or even excuse any (potential) breach of international treaty obligations by the UK, but these examples may help to put the statement of the Secretary of State for Northern Ireland in perspective. The unilateral override of an international treaty – be it a double taxation treaty, the IMF Treaty, or the UN Charter – is neither singular nor unprecedented. The only thing special about the present case is the prior announcement of a (potential) treaty override. Commentators should thus not get carried away. Talk of "Sad, broken Britain" or likening the UK to a "rogue State" because of certain provisions in the UK Internal Market Bill may make good headlines, but is out of place. It seems, however, that the debate is not so much about the technicalities of domestic constitutional or international law but about the self-image of the UK as a country that keeps its word and abides by the rule of law and international obligations. The debate is also reflective of a far deeper and more significant struggle over political propriety and morality in present-day Britain.

As a matter of pure constitutional law, parliament can make laws that violate the country's international treaty obligations and are thus valid and effective in the domestic legal order. At the same time such laws constitute internationally wrongful acts that give rise to the responsibility of the State in the international legal order. That one and the same act can be both legal and illegal at the same time is a consequence of the dualist approach to international law taken by both Germany and the UK. While the UK Government, with the approval of Parliament, can violate international treaty obligations domestically with impunity, it may have to pay a heavy price for doing so in its international relations. Any open breach of a treaty obligation, especially one that was entered into only very recently in full knowledge of the circumstances and consequences, undermines trust and confidence in future treaty commitments made by the UK Government, damages its international reputation, and erodes the international rule of law. It would also put a severe strain on future UK-EU relations. Whether the UK is willing to pay that price is ultimately a political question.
